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IN THE

Supreme Court of the United States

No. 969
Oct. Term, 1963

NELSON BRYANT, et al.,
Petitioners,

v.

CHARLES K. MOORE, et al.,
Respondents.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

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Identification of Parties: Throughout this Brief, the parties are designated as they were in the Petition for Writ of Certiorari:

Petitioners: Contestors-Appellants

Respondents: Contestees-Appellees

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BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

I. THE DECISION OF THE SUPREME COURT OF OHIO WAS NOT NECESSARILY BASED UPON A FEDERAL QUESTION.

On 1 August, 1963, Contestors-Appellants filed their Motion for Leave to Appeal to the Supreme Sourt of Ohio from the decision of the Court of Common Pleas of Warren County, Ohio, dismissing thi election contest. On 9 August, 1963, the Contestors-Appellants filed an extensive Brief in support of their Motion for Leave to Appeal and, on 26 August, 1963, the Contestees-Appellees filed their Brief opposing the Motion for Leave to Appeal. On 3 December, 1963, oral arguments on the Motion for Leave to Appeal were heard by the Supreme Court of Ohio. On 11 December, 1963, the Supreme Court of Ohio overruled the Motion

for Leave to Appeal, without opinion. On 14 December, 1963, Contestors-Appellants applied to the Supreme Court of Ohio for a re-hearing on their Motion for Leave to Appeal, and, on 22 January, 1964, the Supreme Court of Ohio denied re-hearing in this case, without opinion.

The Supreme Court of the United States has jurisdiction to review a judgment or decree of a State Court on appeal only where that judgment or decree determines a federal question. If the decision of a State Court upon a non-federal ground or a point of local or general law is sufficient to support the judgment, leaving no federal question open for determination by the Supreme Court, an appeal is not warranted, and if taken will be dismissed. Further, the Supreme Court of the United States will decline to review, on certiorari to a state court, a question asserted to arise under the Constitution of the United States where, because of uncertainty of the precise grounds of the decision rendered by the State Court, a review of the constitutional question is not clearly necessary to a decision of the case. *State of Minnesota* v. *National Tea Company*, 309 U. S. 551, 84 L. ed. 920. It is settled that in order to justify the United States Supreme Court in reviewing the judgment or decree of a State Court, *the record must show that the judgment rested upon the disposition of a federal question.* Jurisdiction cannot be founded upon a mere surmise that the decision of the State Court turned upon a federal question. It must appear from the record, affirmatively or by fair implication, that the decision of the federal question was necessary to the determination of the cause. See annotation in 84 L. ed. 925, et. seq., and cases cited therein.

> "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment. (Emphasis by the Court) . . . We are without jurisdiction when the

> question of the existence of an adequate state ground is debatable." *Stembridge* v. *State of Georgia*, 343 U. S. 541, 95 L. ed. 1130, 72 S. Ct. 834.

In *Ellis* v. *Dixon, et al.*, 349 U. S. 458, 99 L. ed. 1231, 75 S. Ct. 850, this Court held:

> "New York Court of Appeals denied petitioners motion for leave to appeal without stating any grounds for its decision. 306 N. Y. 981. In these circumstances, we must ascertain whether that Court's decision, 'might' have rested on a non-federal ground, for if it did we must decline to take jurisdiction. *Stembridge* v. *State of Georgia*, 343 U. S. 541, 547, 96 L. ed. 1130, 1133, 72 S. Ct. 834 (1952); see also *Lynch* v. *New York*, 293 U. S. 52, 54, 79 L. ed. 191, 192, 55 S. Ct. 16 (1934)."

In the case under consideration, it is quite probable that the Supreme Court of Ohio, in overruling the Motion for Leave to Appeal, based its decision upon a non-federal ground. It is most likely that the Supreme Court of Ohio overruled the Motion for Leave to Appeal on the basis that the election contest was properly dismissed by the Common Pleas Court because the procedure prescribed by state law for election contests was not followed. The very fact that the Supreme Court of Ohio did not deem it necessary to state the grounds for its decision strongly indicates that it was in accord with the Decision of the Common Pleas Court of Warren County and the grounds stated therein.

As the decision of the Supreme Court of Ohio may reasonably have been based upon a non-federal ground, this Court is without jurisdiction to review the same on appeal.

II. THE CONSTRUCTION PLACED UPON OHIO STATUTES BY THE SUPREME COURT OF OHIO IS CONTROLLING IN THIS APPEAL.

Upon the construction of the Constitution and the laws of a state, the Federal courts as a general rule, have always

followed the decisions of the highest court of the state unless they conflict with, or impair the efficacy of, some principle of the Federal Constitution or of a Federal statute. The Supreme Court of the United States has no authority to inquire into the grounds and reasons on which the highest court of a state proceeded in its construction of the statutes and Constitution of that state. See 14 Am. Jur. 313, and the cases cited therein.

Federal courts are bound by a construction put upon a state statute by the highest court of the state. *Lauf* v. *E. G. Shinner & Co.*, 303 U. S. 323, 89 L. ed. 872, 58 S. Ct. 578. The state courts are the final arbiters of the meaning and appropriate application of state statutes, subject only to review by the Supreme Court of the United States if such construction or application is appropriately challenged on constitutional grounds. *Beal* v. *Missouri P. R. Corp.*, 312 U. S. 45, 85 L. ed. 577, 61 S. Ct. 418. Unless it obviously depends altogether on a misconception of Federal law, a fixed interpretation of a state statute should be accepted by the Federal courts. *Breisch* v. *Central R. Co.*, 312 U. S. 484, 85 L. ed. 964, 61 S. Ct. 662, 132 A. L. R. 918.

The United States Court of Appeals, Seventh Circuit, in *Trust Company of Chicago, Adm'r* v. *Pennsylvania R. Co.*, 183 F. (2d) 340, 21 A. L. R. (2d) 238, held:

> "A federal court will follow and accept as correct the decisions of the highest court of a state as to the powers and the extent of the jurisdiction of the courts of that state."

III. CONSTRUCTION OF OHIO ELECTION CONTEST STATUTES BY THE SUPREME COURT OF OHIO.

The pertinent provisions of Ohio law relating to election contests are set forth in Sections 3515.09, 3515.10, 3515.11 and 3515.15, Ohio Revised Code. These statutes are quoted in full on pages 5, 6, and 7, of the Petition for Writ of

Certiorari herein. The Contestors-Appellants make no claim that said statutes, or any of them, violate either the Constitution of Ohio or the Constitution of the United States.

The Supreme Court of Ohio has interpreted the election contest statutes on numerous occasions. Without exception, the Supreme Court of Ohio has held that such statutes must be strictly construed and the procedures specified therein scrupulously complied with. One of the best statements of the position of the Supreme Court of Ohio is contained in *Jenkins* v. *Hughes*, 157 O. St. 186, 105 N. E. (2d) 58, 47 O. Ops. 127, viz.:

> ". . . Sections 4785.168 and 4785.169, General Code (now Sections 3515.10 and 3515.11, R. C., respectively), relate to contests of elections wherein the Common Pleas Court acts not in a judicial capacity but in a political administrative capacity with its authority and procedure therefore specifically authorized and provided by statute. *McClintock* v. *Sweitzer*, 138 Ohio St., 324 20 O. O. 383, 34 N. E. (2d) 781; *Link* v. *Karb, Mayor*, 89 Ohio St., 326, 104 N. E. 632; *State, ex rel. Shriver, County Engineer* v. *Hayes*, 148 O. St. 681, 36 O. O. 277, 76 N. E. (2d) 869.
>
> "The courts have no jurisdiction to conduct an election contest in the absence of statutory authority therefor. *State, ex rel.* v. *Harmon*, 31 Ohio St. 250; *Link* v. *Karb, Mayor*, supra; *State, ex rel. Kautzman* v. *Graves, Secy. of State*, 91 Ohio St. 113, 110 N. E. 185; *Thompson* v. *Redington*, 92 Ohio St. 101, 110 N. E. 652, Ann. Cas. 1918A, 1161; and *Williams* v. *O'Neill*, 142 Ohio St., 467, 27 O. O. 400, 52 N. E. (2d) 858.
>
> "This court has held that the election statutes of the state must be strictly construed. *Williams* v. *O'Neill*, supra; *Foraker* v. *Perry Township Rural School District Board of Education*, 130 Ohio St. 243, 4 O. O. 264, 199 N. E. 74. Election contests are special and summary in nature, and the procedure prescribed by statute to bring an election contest within the jurisdic-

tion of specified authority must be strictly observed. *Williams* v. *O'Neill*, supra, *Ingerson* v. *Marlow*, 14 Ohio St. 568. In fact, the only authority which the Court has in an election contest is derived from the statutes."

* * * * *

"The public interest in having election contests speedily determined requires promptitude. Prompt action in hearing and determining election contests so as to end a status effected by an election contest or to terminate a holdover office—occupancy before a term has wholly or in great part expired seems to be the policy of the law. *English* v. *Dickey*, 128 Ind. 174, 27 N. E. 495, 13 L. R. A. 40; *Walton* v. *Olson*, 40 N. D. 571, 170 N. W. 107; *Whitney* v. *Blackburn*, 17 Ore. 564, 21 P. 874, 11 Am. St. Rep. 857. And a provision for the commencement of the contest within a designated time is usually regarded as mandatory (*Vailes* v. *Brown*, 16 Colo. 462, 27 P. 945, 14 L. R. A. 120) and must be complied with in order to confer jurisdiction in the case. Furthermore, *where a contester, before the expiration of the time within which an election contest under a statute must be tried, obtains a postponement, or acquiesces in a postponement which carries the case beyond the time limit, he thereby discontinues his contest. English* v. *Dickey*, supra." *Jenkins* v. *Hughes*, 157 Ohio St. 186, 47 Ohio Ops. 127, 105 N. E. (2d) 58. (Emphasis added.)

See also *McCall* v. *Board of Education*, 169 Ohio St. 50, 8 O. Ops. (2d) 11.

IV. THE DISMISSAL OF THE ELECTION CONTEST BY THE COMMON PLEAS COURT WAS NOT A DENIAL OF DUE PROCESS OF LAW.

Sections 3515.10 and 3515.11, Ohio Revised Code, which are quoted in full on pages 5 and 6 of the Petition for Certiorari herein, prescribe a thirty day time limit after the filing of the petition in an election contest within which

such contest must be heard. Such statutes also specify conditions upon postponements or adjournments of such hearing, and prescribe that the hearing shall not be extended more than thirty days.

The Court of Common Pleas of Warren County, Ohio, dismissed this election contest for the reason that the same had not been heard within the time prescribed by law. Contestors-Appellants do not question the adequacy of the statutory remedy for contesting elections, conceding that this remedy meets the constitutional requirements for due process. It is the contention of Contestors-Appellants that they have been denied due process by reason of the dismissal of the action, notwithstanding the fact that the Common Pleas Court specifically found that the Contestors-Appellants had failed to comply with the mandatory requirements of the statutes.

The essential elements of due process of law are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause. 12 Am. Jur. 267, et seq. The election contest statutes of Ohio afford an opportunity to be heard. In this case, the Contestors-Appellants have failed to take advantage of the opportunity afforded them by statute. One who fails to avail himself of the opportunity to be heard when the same is afforded him, cannot be heard to complain that he was denied due process.

The Journal Entry of the Common Pleas Court dismissing the contest (see Appendix B, page 3A, of the Petition herein), recites: "This cause came on to be heard on 3 April, 1963, upon the Motion of the Contestees to dismiss the contest for the reason that the same has not been heard within the time specified by statute, the Memorandum filed with said Motion and upon arguments of counsel for both Contestors and Contestees." As Contestors-Appellants point out on page 12 of their Petition, two hearings were held

on the Motion to Dismiss, at which time counsel for Contestors-Appellants were heard in full in opposition to the Motion.

Subsequent to the first hearing on the Motion to Dismiss, the Common Pleas Court filed a written Decision, which is set forth in Appendix A, page 1A, of the Petition herein finding, in part: "The file in this matter fails to indicate that the Contestors have, at any time, requested that the contest be set for trial and indeed the record indicates that 'Interrogatories of Contestors' were filed by Contestors on February 25, 1963, some eighty-seven (87) days after the filing of the contest. It is, therefore, the decision of the Court that upon the cited authority requiring strict construction of the statutes involved, that the motion of the Contestees must be sustained." Although two hearings were held subsequent to the rendition of this decision on Contestors-Appellants' motion to vacate the entry of dismissal, nothing was presented which would warrant the Court in changing its findings as set forth in its decision. The Common Pleas Court, having found that the Contestors-Appellants had failed to comply with the applicable statutes, had no jurisdiction to proceed further to hear the election contest. *McCall* v. *Board of Education*, 169 O. St. 50, 8 O. Ops. (2d) 11.

The Supreme Court of Ohio, having before it the record of the proceedings below, including the Decision of the Common Pleas Court, and after having considered extensive Briefs by both sides and the arguments of counsel for both Contestors-Appellants and Contestees-Appellees, affirmed the Court of Common Pleas without opinion.

This election contest was dismissed for noncompliance with the mandatory provisions of the Revised Code of Ohio regarding the manner of conducting election contests. Such dismissal was in accord with well settled principles of Ohio law. The Contestors-Appellants were provided with an op-

portunity to be heard on the merits by the procedures provided by statutes; the dismissal of the contest does not constitute a denial of due process of law when Contestors-Appellants fail to avail themselves of such opportunity within the time prescribed by law.

V. CONTESTORS-APPELLANTS HAD NO APPEAL AS OF RIGHT TO THE SUPREME COURT OF OHIO UNDER OHIO LAW.

Contestors-Appellants further claim that they were denied due process of law in that the Supreme Court of Ohio refused to admit their appeal and to grant them a full hearing on the merits. Contestors-Appellants contend that they had an appeal as of right to the Supreme Court of Ohio, and that they should not have been required to first obtain leave to appeal.

Apparently, this contention of Contestors-Appellants is of recent origin. Contestors-Appellants, without complaint, filed a Motion for Leave to Appeal to the Supreme Court of Ohio in August, 1963. They did not attempt to file an appeal as of right in the Supreme Court of Ohio. The first time that Contestors-Appellants claimed an appeal as of right was in their Application for Re-hearing in the Supreme Court of Ohio, filed in December, 1963. In any event, it is the well settled law of Ohio that leave to appeal must first be had in the Supreme Court of Ohio. As has been pointed out previously in this Brief, the Supreme Court of the United States not only accepts, but is bound by the construction given to state statutes by state courts. *Aero Mayflower Transit Co.* v. *Railroad Com'n'rs*, 332 U. S. 495, 92 L. ed. 99, 68 S. Ct. 167.

Section 3515.15, Ohio Revised Code, provides for an appeal on questions of law in an election contest to the Supreme Court of Ohio. This statute is quoted in full on pages 6 and 7 of the Petition herein. This statute provides

in part: "The laws and rules of the court governing appeals apply in the appeal of contested election cases."

Among those laws is Section 2505.29, Ohio Revised Code, which reads:

> "No appeal shall be filed in the supreme court unless such court or a judge thereof grants leave to file such an appeal. Such leave need not be obtained to file an appeal as to the judgment or final order of the court of appeals, or a judge thereof, in cases involving questions under the constitution of the United States, or of this state, in cases which originated in the court of appeals, and as to proceedings of administrative officers as may be provided by law."

In each and every case where an appeal was taken directly to the Supreme Court of Ohio in an election contest, without first obtaining leave to appeal, the Supreme Court of Ohio, on motion, dismissed the appeal. See *Young* v. *Fielder*, 159 O. St. 184, 50 O. Ops. 149, 111 N. E. (2d) 394; *Bees* v. *Gilronan*, 159 O. St. 186, 50 O. Ops. 149, 111 N. E. (2d) 395; *Foraker* v. *Board of Education*, 130 O. St. 243, 4 O. Ops. 264, 199 N. E. 74; *Duncan* v. *Pogue*, 126 O. St. 377, 185 N. E. 553.

VI. CONCLUSION.

There is no Federal question of substance presented by this appeal. The decisions of the Ohio courts are supported by fixed principles and construction of Ohio law. The dismissal of the election contest was based upon noncompliance with statutory requirements. Contestors-Appellants failed to avail themselves of the opportunity to be heard which the Ohio statutes provided. There is no question that the Contestors-Appellants not only "acquiesced in" continuances, postponements and delays, they actively caused them by their own conduct. The Contestors-Apellants, having initiated the action, are under a duty to proceed with the

case and to take affirmative steps to comply with the procedural requirements of the law. Dismissal of this election contest, under the circumstances of this case, did not violate any constitutional right of Contestors-Appellants.

VII. PRAYER.

WHEREFORE, Contestees-Appellees pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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